

IV

CONCLUSION

Based on the foregoing, plaintiffs have clearly demonstrated triable issues of fact, and defendant has failed to show a complete defense to plaintiffs' §17200 cause of action. Defendant's motion for summary judgment is therefore denied.

IT IS SO ORDERED.

Dated: July 29, 2010

William F. Highberger
Judge of the Superior Court

Exhibit 3

DOUGLAS CAIAFA, ESQ. (State Bar No. 107747)
DOUGLAS CAIAFA, A Professional Law Corporation
11845 West Olympic Boulevard, Suite 1245
Los Angeles, California 90064
(310) 444-5240

CHRISTOPHER J. MOROSOFF, ESQ. (State Bar No. 200465)
LAW OFFICE OF CHRISTOPHER J. MOROSOFF
77-735 California Drive
Palm Desert, California 92211
(760) 469-5986

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MARK SWINEGAR, an individual; and
MICHELE OZZELLO-DEZES, an individual;
individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

TIME WARNER CABLE, INC., a Delaware
Corporation; and DOES 1 through 1,000,
inclusive,

Defendants.

) Case No. BC 389755

) Action Filed: April 28, 2008

) [Assigned for All Purposes to the Honorable
William F. Highberger, Department 307]

) **PLAINTIFFS' SEPARATE STATEMENT**
) **OF UNDISPUTED AND DISPUTED**
) **MATERIAL FACTS IN OPPOSITION**
) **TO DEFENDANT TIME WARNER**
) **CABLE INC.'S MOTION FOR**
) **SUMMARY JUDGMENT**

) May 4, 2010

) Date:

) Time: 1:30 p.m.

) Dept: 307

) Judge: Hon. William F. Highberger

) Trial Date: None Set

Plaintiffs MARK SWINEGAR ("SWINEGAR"), and MICHELE OZZELLO-DEZES
("OZZELLO-DEZES"), (collectively "Plaintiffs") submit the following Separate Statement of
Undisputed and Disputed Facts pursuant to California Code of Civil Procedure Section 437c(b)3
and California Rules of Court, Rule 3.1350(f):

<p>Defendant TWC's Undisputed Material Facts and Supporting Evidence</p>	<p>Plaintiffs' Response and Supporting Evidence</p>
<p>1. When TWC acquired Swinegar's franchise area in August 2006 from Comcast Cable Corp., TWC did not make any changes to Swinegar's services or equipment, and did not change the manner or amount in which he was billed.</p> <p>Declaration of France Jaffe ("Jaffe Decl.") Ex. A (Deposition of Mark Swinegar ("MS Dep.)) at 54:9-15, 111:9-16; see also Declaration of David Su ("Su Decl.") ¶ 24 (10:6-10) & Ex. II at 23-24 (July 2006), 560- 61 (August 2006), 25-26 (September 2006); 64-65 (March 2008); see generally id. at 5- 80.</p>	<p>1. <u>Undisputed</u>: Plaintiffs do not dispute that in August of 2006 TWC acquired Swinegar's franchise area from Comcast.</p> <p>1. <u>Disputed</u>: TWC made changes to Swinegar's services and equipment, and changed the manner and amount in which he was billed <u>after</u> August of 2006.</p> <p>Caiafa Dec., <u>Exh. "5"</u> (Swinegar Bills) at pages 24 & 47 (Comcast bill to Swinegar dated July 2006 bills for "Standard Cable" at \$50.45; compared to TWC bill to Swinegar dated September 2007 which bills for "Surf N' View - Extreme" at \$89.95.)</p>
<p>2. TWC mailed existing Comcast subscribers like Swinegar and Dezes a copy of the TWC Subscriber Agreement around the time it acquired former Comcast franchises in 2006.</p> <p>Su Decl. ¶ 5 (2:10-13) & Ex. F (2135-46).</p>	<p>2. <u>Undisputed</u>.</p>
<p>3. Swinegar called TWC in August 2007 to order the Surf N' View bundle.</p> <p>Jaffe Decl. Ex. A (MS Dep.) at 70:8-74:1 (testifying as to everything he remembered regarding conversation with TWC representative in August 2007), 81:15-18 (Swinegar ordered "Surf N' View extreme), 108:22-109:1 ("I asked for Surf N' View").</p>	<p>3. <u>Undisputed</u>. Plaintiff does not dispute that he called TWC in August of 2007.</p> <p>3. <u>Disputed</u>: Swinegar called TWC in August of 2007 in order to order basic cable and internet.</p> <p><u>Exh. 8</u>, (Swinegar Depo.): ("I just told them I wanted basic cable and Internet service. . ." (71/5-6); ("Question: You've said I've seen the flier. I'm interested in getting the Internet plus the basic cable service, do I have this right? Answer: Yes." (71/17-20); ("I asked for cable and Internet, basic cable and Internet (107/11-12); ("Question: So is it your understanding that if standard and basic are not the same that you only ordered basic? Answer. Yes.")(108/13-16).</p>

1 4. TWC CSRs are trained to inform
2 subscribers of applicable equipment
3 charges and are trained to offer
4 subscribers signing up for Digital
5 Cable their choice of equipment
6 (currently, customers may choose
7 between a digital box, an HD box, or
8 an HD DVR box).
9 Su Decl. ¶¶ 15-17, 19 (6:15-7:22, 19:
10 3-16) & Exs. K at 686, L at 741, M at
11 784, N at 820; Tat 1194, U at
12 2857-60, W at 3056, X at 888, Z at
13 1895; Su Decl. Ex. A (Deposition of
14 David Su ("Su Dep.")) at 233:2-234:7,
15 299:2-304:7; Declaration of Adrina
16 Smith ("Smith Decl.") ¶¶
17 2, 4-8 (1:6-11, 1:16-3:10).

4. Disputed: TWC CSR's are not trained to inform
subscribers of charges for converter boxes, remote
control devices or digital programming fees.
Exh. 12, Smith Depo., 84/22-25 (Smith's regular
practice with respect to communicating with
customers of TWC is no different than any other
CSR's regular practice); 141/22-142/2 (Any call
selected from Smith's sales calls should follow her
regular practice of communicating with customers);
146/18-21 (Smith did not advise the customer on Call
No. 5112r of any applicable equipment charges);
147/5-8 (Customer on call no. 5112r never agreed
that the equipment included in the order was
accurate).

Exh. 13, Transcription of TWC Customer Service
Call Ending "5112r" between Adrina Smith and a
TWC customer (Exh. "8" to the Depo. Transcript of
Smith).

Exh. 11, Mike Pemberton ("Pemberton")
Depo. 116/20-24 (It is not part of CSR's training at
TWC to advise customers that remote controls have a
monthly cost).

Dezes Declaration (filed concurrently herewith); ¶ 4
(not advised of separate charges for converter or
remote - or discovery responses).

Exh. 19.; Dezes' Responses to Special Interrogatories
of TWC (Nos. 1, 2, 4, 5, 8, 13, (she did not request and
was not advised of additional equipment charges for
cable); No. 11 (she believed the charges for
converters and remotes included within monthly
price for cable).

Swinegar Declaration (filed concurrently herewith):
¶ No. 3 (Swinegar did not request a converter box or
remote control from TWC and was not advised of the
charges for the converter or remote);

Exh. 20. Plaintiff Mark Swinegar's Responses to
Special Interrogatories, Nos. 1, 4 & 5.

Disputed: The training materials relied on by
Defendant postdate its communications with
Plaintiffs and are thus irrelevant to plaintiffs and fail
to establish an affirmative request by either plaintiff.

Exh. K to Su's Decl. post-dates the filing of the
lawsuit by over one year and is not contemporary to
the calls at issue which occurred in 2007;

Su Decl., L at 741 - Instructor Guide Dated March
2009 (post-dates lawsuit); The documents referenced
by TWC advise the CSR that equipment is not
included in certain packages but do not instruct the
CSR to "inform the customer of applicable
equipment charges," as claimed by Defendant.

Exhs. K at 686, L at 741, M at 784, N at 820; T at
1194, U at 2857-60, W at 3056, X at 888, Z at 1895.
Su Decl. Ex. A (Deposition of David Su ("Su Dep."))
at 233:2-234:7, 299:2-304:7;

1 5. In August 2007, it was the regular
2 practice of Adrina Smith, the TWC
3 CSR who spoke with Swinegar, to (a)
4 inform Digital Cable subscribers that
5 additional equipment charges applied;
6 (b) ask Digital Cable subscribers to
7 choose between an HDTV receiver, a
8 DVR receiver, and a regular digital
9 receiver (and to quote the price of
10 each type of receiver); and (c) before
11 finalizing the order, repeat all the
12 services and equipment selected and
13 their prices, and ask the subscriber to
14 confirm verbally that the order was
15 accurate and that the subscriber
16 wanted to proceed with the order.

17 Smith Decl. ¶¶ 3-8 (1:12-3:10).

5. Disputed: Smith's deposition testimony on
February 26, 2010, directly contradicts her
declaration. Specifically, despite the "regular
practice" she described in her declaration dated
November 12, 2009, she (a) did not inform customers
of equipment charges, (b) did not ask customers to
choose between receivers and (c) did not, before
finalizing the order, repeat all the services and
equipment selected and their prices, and ask the
subscriber to confirm verbally that the order was
accurate and that the subscriber wanted to proceed
with the order before finalizing the order.

Exh. 12, Smith Depo., 84/22-25 (Smith's regular
practice with respect to communicating with
customers of TWC is no different than any other
CSR's regular practice); 141/22-142/2 (Any call
selected from Smith's sales calls should follow her
regular practice of communicating with customers);
146/18-21 (Smith did not advise the customer on Call
No. 5112r of any applicable equipment charges);
147/5-8 (Customer on call no. 5112r never agreed
that the equipment included in the order was
accurate).

Exh. 13, Transcription of TWC Customer Service
Call Ending "5112r" between Adrina Smith and a
TWC customer shows that she did NOT (a) inform
Digital Cable subscribers that additional equipment
charges applied; (b) ask Digital Cable subscribers to
choose between an HDTV receiver, a DVR receiver,
and a regular digital receiver (and to quote the price
of each type of receiver); or (c) before finalizing the
order, repeat all the services and equipment selected
and their prices, and ask the subscriber to confirm
verbally that the order was accurate and that the
subscriber wanted to proceed with the order.

20 6. It has always been the practice of
21 the TWC technician who installed
22 Swinegar's service to leave a copy of
23 the TWC Welcome Kit, which
24 includes the current version of the
25 TWC Subscriber Agreement, as well
26 as a rate card and a copy of the signed
27 work order with subscribers after
28 completing any installation.

Declaration of Mark Davis ("Davis
Decl.") ¶¶ 2-4 (1:5-2:1); see also Su
Decl. ¶ 23 (9:17-10:5) & Ex. GG
(347-372) (TWC Welcome Kit
provided to subscribers in Swinegar's
franchise area in 2007).

6. Undisputed.

1 7. Swinegar signed the Work Order
2 presented by the TWC technician after
3 the technician installed his Surf N'
4 View service, received a copy of the
5 signed Work Order, and specifically
6 asked the technician to install the
7 digital receiver on top of the television
8 set.

9 Jaffe Decl. Ex. A (MS Dep.) at
10 75:7-25, 77:21-78:25, 79:19-24,
11 85:20-86:14 (testifying he signed
12 August 30, 2007 Work Order); see
13 also Davis Decl. ¶¶ 2-3 (1:5-21); Su
14 Decl. Ex. CC (August 30, 2007 Work
15 Order).

7. Undisputed.

16 8. Swinegar signed a second Work
17 Order the very next day.

18 Jaffe Decl. Ex. A (MS Dep.) at 93
19 :4-13, 94:6-11; see also Su Decl. ¶
20 21(9:6-11) & Ex. EE (August 31,
21 2007 Work Order).

8. Undisputed.

22 9. Both Swinegar's Work Orders state
23 "My signature on this work order
24 indicates that I have received and
25 agreed to the terms of the Time
26 Warner Cable Residential Services
27 Subscriber Agreement, separately
28 provided to me by Time Warner
Cable.... The terms of the Time
Warner Cable Residential Services
Agreement ... are incorporated into
this work order by reference as if set
out in full herein."

Su Decl. ¶ 21(9:6-11) & Exs. CC, EE;
see also id., FF (blank Work Order
with same language).

9. Undisputed.

1 10. The Subscriber Agreement
2 contained in the Welcome Kits to be
3 distributed on installations in Dezes
4 and Swinegar's franchise area in 2007
5 contains the following provisions: "(1)
6 (a) This Agreement [and] the Work
7 Order, . . . constitute the entire
8 agreement between TWC and me. . . .
9 (d) My acceptance of Services
10 constitutes my acceptance of the terms
11 and conditions contained in this
12 Agreement. . . . (2)(a) I agree to pay
13 TWC for (i) all use of my Services. . .
14 (ii) installation and applicable service
15 charges, (iii) TWC Equipment. . . .
16 (2)(l) I agree that it is my
17 responsibility to report TWC billing
18 errors within 30 days from receipt of
19 the bill so that service levels and all
20 payments can be verified. If not
21 reported within 30 days, the errors are
22 waived."

23 Su Decl. ¶ 23 (9:17-10:5) & Ex. GG at
24 369; see also id., ¶ 23 & Ex. HH
25 (2008 version of Subscriber
26 Agreement) at 2129; see also Jaffe
27 Decl. Ex. D at 1-4 (current Subscriber
28 Agreement with identical language).

10. Undisputed.

11. Starting with a bill dated
September 22, 2007, TWC began
billing Swinegar for Surf N' View
service. The itemized statements
separately identify the equipment
charges: "Digital Cable Receiver
\$4.24 (Includes Remote Control At
\$.23)."

Su Decl. Ex. II at 46-63; see also id. at
64-80 (HDTV bills itemizing
equipment charge).

11. Undisputed: Undisputed that TWC started
billing Swinegar for Surf N' View with a bill dated
September 22, 2007. Plaintiffs do not dispute that
the bills dated from September 22, 2007 through
February 22, 2008, reflect charges for "Digital Cable
Receiver \$4.24 (Includes Remote Control At \$.23)."

11. Disputed: Exh. 5, Swinegar Bills at 79; bills after
February of 2008 do not "itemize equipment charges"
since those bills do not itemize any charges for
remote control devices and list charges as follows:
"HDTV Receiver (Includes . . . 6.50."

Su Decl. Ex. II at 64-80 (HDTV bills listing charges
as "HDTV Receiver (Includes . . . 6.50.")

<p>12. Swinegar called TWC in March 2008 to ask why his new HDTV was not working. The TWC CSR informed him that he needed to exchange his regular digital receiver for an HDTV receiver in order for his HDTV to receive TWC's HD programming. Swinegar took his regular digital receiver to a TWC store to perform the exchange.</p> <p>Jaffe Decl. Ex. A (MS Dep.) at 83:8-84:7, 96:18-97:2, 133:18-23; see also id., Ex C (Mark Swinegar's Responses to TWC's Special Interrogatories) at No. 1 (5:4-9)</p>	<p>12. <u>Undisputed.</u></p>
<p>13. Swinegar did not complain to TWC about the equipment charges within thirty days after receiving his first bill after he requested the Surf N' View service in September 2007.</p> <p>Jaffe Decl. Ex. A (MS Dep.) at 28:10-17.</p>	<p>13. <u>Undisputed:</u></p>
<p>14. Dezes was a Comcast Cable subscriber until August 2006, when TWC took over her franchise area.</p> <p>SuDecl. ¶¶4, 27(1:16-2:9, 10:22-28) & Ex. JJ at 435-438.</p>	<p>14. <u>Undisputed.</u></p>
<p>15. Between August 2006 and September 2007, TWC did not change Dezes' level of service, and continued to bill her for Digital Bronze package and for one additional receiver package.</p> <p>Su Decl. ¶¶ 27-28 (10:22-11:23) & Ex. JJ at 433-460.</p>	<p>15. <u>Undisputed:</u> Between August 2006 and September 2007, TWC did not change Dezes' level of service, and continued to bill her for Digital Bronze package <i>and for an additional digital converter box and remote.</i></p> <p><u>Disputed.</u> Plaintiffs dispute the terminology "additional receiver package" since no such terminology is used on the billing statement to Dezes identified as Exh. JJ. The terminology used is "Additional Digital . . . \$6.95. Box(es) and Remote(s)."</p> <p>Su Decl. Ex. JJ at 433-460.</p>

1 2 3 4 5 6 7	<p>16. In September 2007, Dezes paid \$58.99 for Comcast's Digital Bronze Package (which included a digital receiver and remote control), as well as an additional \$6.95 for the second digital receiver and remote control that she needed to watch the Digital Bronze Package on a second television.</p> <p>Su Decl. ¶¶ 27-28 (10:22-11:23) & Ex. JJ at 459-60.</p>	<p>16. <u>Disputed</u>. Plaintiff Dezes did not <i>need</i> to rent a remote control unit to watch her Digital Bronze Package on any television.</p> <p>Ex. JJ at 459-60 (September 2007 bill does not indicate that remote control was "needed" to watch Dezes' cable service.</p>
8 9 10 11 12 13 14 15 16	<p>17. In September 2007, Road Runner Extreme (the Road Runner speed that Dezes received) cost \$54.95.</p> <p>Su Decl. ¶ 28(11:1-23) & Ex. JJ at 521 (showing same price for Road Runner Extreme (renamed Turbo) in 2008)</p>	<p>17. <u>Undisputed</u>. Plaintiff does not dispute that <i>a la carte</i> price for Road Runner Extreme was \$54.95 in April 2008.</p> <p><u>Disputed</u>: The price for RR Extreme when combined with a digital cable package with one digital tier, like Dezes had, effectively cost \$37.00, not \$54.95..</p> <p>Ex. 16: Time Warner Cable's New Bundle Packages effective March 1, 2008, TWC SWIN 0003056.</p> <p>Ex. 15: Time Warner Cable's "A-la carte Prices" effective March 1, 2008, TWC SWIN 0003055.</p> <p>Ex. 6: TWC SWIN 379-528 (04/04-09/08); Billing Statements sent to Michele Ozzello at 465 - shows bundled price of \$79.95 during promotional 12-month period.</p> <p>Ex. JJ at 521 (shows only <i>a la carte price</i> for Road Runner High Speed Online Turbo in April 2008)</p>
17 18 19 20 21 22 23 24 25 26 27 28	<p>18. Dezes would have paid \$120.89 per month had TWC simply added Road Runner Extreme to her existing Digital Bronze Package.</p> <p>Su Decl. ¶ 28 (11:1-23) & Ex. JJ at 459-60</p>	<p>18. <u>Disputed</u>. None of the evidence cited by Defendant demonstrates that TWC was entitled to "simply add" Road Runner Extreme to Dezes' existing Digital Bronze Package. In addition, none of the evidence cited demonstrates that Dezes ever requested TWC to simply add Road Runner Extreme to her Digital Bronze Package.</p> <p>Exh. 11, Pemberton Depo., 107/6-11 (Pemberton does not recall "any aspects" of his call with Dezes or any discussion about her changing her cable service from P2 Bronze to Surf N' View).</p> <p><u>Declaration of Michele Dezes</u> (filed concurrently herewith) ¶ 10 (Dezes never requested TWC to simply add Road Runner Extreme to her Digital Bronze Package).</p> <p><u>Disputed</u>. Evidence cited by TWC does not establish: (1) That TWC was entitled to "simply add" Road Runner Extreme to Dezes' existing Digital Bronze Package; (2) That TWC was entitled to provide bundled service of Digital Cable and Internet at anything other than the bundled price; or that (3) Dezes ever requested TWC to simply add Road Runner Extreme to her Digital Bronze Package.</p>

1 19. As a result of subscribing to
2 TWC's bundled Surf N' View
3 package, Dezes paid \$79.95 for
4 Digital Cable and Road Runner
5 Extreme, as well as \$4.24 for her first
6 digital receiver package and \$6.95 for
7 her second digital converter and
8 remote control.

9 Su Decl. ¶ 28 (11:1-23) & Ex. JJ at
10 464-65.

Disputed: Dezes paid monthly charges of \$4.01 for her first Digital Receiver and \$.23 for her first remote control device. Dezes paid monthly charges of \$4.01 for her second Digital Receiver, \$.23 for her second remote control device, and \$2.71 for a digital programming fee (although cost not itemized). Dezes also paid \$79.95 for Surf N' View for the initial 12 month promotional period only before TWC raised the price to \$89.95 per month. The price for digital receivers was also raised by TWC.

Exh. 6, Dezes Billing Statements from April 2004 to April 2009, at 465, (November 5, 2007)(\$4.01 for 1st dig. rec., \$.23 for 1st remote; \$4.01 for 2nd dig. rec., \$.23 for 2nd remote & a \$2.71 digital programming fee); bill dated April 5, 2009 - charged \$89.95 per month for Surf N' View; (\$6.31 for 1st dig. rec., \$.19 for 1st remote; \$6.31 for 2nd dig. rec., \$.19 for 2nd remote & a \$2.00 digital programming fee).

11 20. Her total monthly bill was \$91.14
12 -- \$29.75 less than it would have been
13 had she simply added Road Runner
14 Extreme to her existing Digital
15 Bronze package.

16 Su Decl., ¶28-29(11:1-12:1)&Ex.JJat
17 464-65.

Undisputed. Dezes does not dispute that her bill was \$91.14 per month.

Disputed. Evidence cited by TWC does not establish: (1) That TWC was entitled to "simply add" Road Runner Extreme to Dezes' existing Digital Bronze Package; (2) That TWC was entitled to provide bundled service of Digital Cable and Internet at anything other than the bundled price; and, (3) That Dezes ever requested TWC to simply add Road Runner Extreme to her Digital Bronze Package.

Dezes Declaration, ¶10 (Dezes never requested TWC to simply add Road Runner Extreme to her Digital Bronze Package).

Exh. 16, (New Bundle Packages Effective March 2008).

Exh. 11, Pemberton Depo., 107/6-11 (Pemberton does not recall "any aspects" of call with Dezes or discussion about her changing her cable service from P2 Bronze to Surf N' View.)

Exh. 6, Dezes Billing Statements at 465 shows Surf N' View Extreme package charged at promotional rate of \$79.95, not separate *a la carte* charges for Digital Bronze package and Road Runner Extreme.

<p>21. Dezes signed a Work Order on September 29, 2007, which stated "My signature on this work order indicates that I have received and agreed to the terms of the Time Warner Cable Residential Services Subscriber Agreement, separately provided to me by Time Warner Cable.... The terms of the Time Warner Cable Residential Services Agreement ... are incorporated into this work order by reference as if set out in full herein."</p> <p>Jaffe Decl. Ex. B (Deposition of Michele Ozzello-Dezes ("MD Dep.") at 56:2-12; Su Decl. ¶ 21(9:6-11) & Ex. DD (Dezes Work Order).</p>	<p><u>Undisputed.</u></p>
<p>22. The third-party installer who installed Dezes' service in September 2007 was required by the terms of his contract with TWC to leave a copy of the Welcome Kit (which contained the current version of the TWC Subscriber Agreement) and a copy of the signed Work Order with subscribers.</p> <p>See Declaration of Ike Wells ¶ 4 (1:12-23) & Ex. A at 2892; see also Su Decl. ¶ 23 (9:17- 10:5) & Ex. GG at 347-68 (2007 Welcome Kit including Subscriber Agreement).</p>	<p><u>Undisputed.</u></p>
<p>23. The third party installer did not replace Dezes' converters.</p> <p>Jaffe Decl., Ex. B (MD Dep.) at 44:10-16; see also Su Decl. ¶ 27 (10:22-28) & Ex. KK.</p>	<p><u>Disputed.</u> Exh. 11, Pemberton Depo., p. 104/19-22: ("one digital receiver and remote is being removed and one digital receiver and remote is being added."); p. 105/10-106/2: (Does not know and cannot tell from looking at the work order whether converter boxes were changed at the time of installation); <u>Exhibit KK</u>, according to the declaration of Mr. Su, Exh. KK represents the exchange of "one of her two digital receivers," and does not establish that the installer "did not replace Dezes' converters." Exh. 7: MD Depo. at 44:10-16: (Dezes not aware of whether installer replaced converters at time he added internet service. This does not establish that he did not actually replace one or more converters). <u>Exh. 4</u>, Dezes Work Order.</p>

1 24. TWC did not bill Dezes for Surf
2 N' View until October 5, 2007, at
3 which point TWC charged her for the
4 partial month (September 29, 2007
5 through October 14, 2007) of services
6 she had received to that point and, per
7 industry practice, one month in
8 advance.

9 SuDecl. ¶25 (10:11-15) & Ex. JJ at
10 461-62 (showing partial month
11 charges for 9.29.07 through 10.14.07,
12 and first full month charge for
13 10.15.07-11.14.07).

14 25. The TWC bills to Dezes from
15 October 5, 2007 forward itemize all
16 service and equipment charges,
17 including charges for the two digital
18 receivers and remote controls.

19 Su Decl. ¶ 24 (10:6-10) & Ex. JJ at
20 461-78, 505-532, 590-612.

21 26. Dezes did not complain to TWC
22 about her bills within thirty days of
23 receipt and continues to subscribe to
24 Surf N' View because she wants her
25 cable and her Internet.

26 Jaffe Decl. Ex. B (MD Dep.) at
27 52:2-9; 55:7- 21, 58:9-18.

Undisputed. That TWC did not bill Dezes for Surf N' View until October 5, 2007, at which point TWC charged her for the partial month (September 29, 2007 through October 14, 2007) of services she had received to that point and for one month in advance.

Disputed. The evidence cited does not establish that the cable "industry's practice" is to bill one month in advance for all services and equipment. The Su Decl. at ¶25 does not mention industry practice. Exh. JJ is merely a bill.

Undisputed. Undisputed that Dezes bills beginning October 2007 itemize charges for converter boxes and remote control units.

Disputed. Exh. 6, Dezes Billing Statements at 465 show that bills do not "itemize" the cost of the "digital programming fee," since no cost is listed for that fee, yet customer is actually charged \$2.71 per month for that fee.

Disputed. Plaintiffs dispute that bills itemize separate charges for "View" portion of "Surf N' View Extreme" which is charged at \$89.95 for both services combined.

Exh. JJ at 461-78, 505-532, 590-612.

26. Disputed. Plaintiffs dispute that intentionally charging them for converter boxes and remote controls without their affirmative request constitutes a "billing error." Plaintiffs' Second Amended Complaint alleges unlawful charges, not "billing errors." Nevertheless, Dezes did "complain" about the unlawful charges by virtue of being a named plaintiff in the operative Second Amended Complaint which "complains" to TWC about its billing practices which occurred within 30 days of the filing of the SAC and thereafter.

Exh. 21, Second Amended Complaint.
Exh. 18, Order Overruling Demurrer To Second Amended Complaint.

1 Plaintiffs also contends the following material facts are disputed:

2 **Plaintiffs' Additional Triable Issues of Material Fact**

3 **1. The Subscriber Agreement And Work Order Define And Control The Relationship**
4 **Between TWC And Plaintiffs; And, Do Not Constitute An Affirmative Request**

5 27. The Subscriber Agreement
6 distributed to Dezes and Swinegar's franchise
7 area in 2007 contains the following
8 provisions:

9 “(1)(a) This Agreement, [and] the Work
10 Order, . . . constitute the entire agreement
11 between TWC and me. This Agreement
12 supercedes all previous written or oral
13 agreements between TWC and me. I am not
14 entitled to rely on any oral or written
15 statements by TWC's representatives relating
16 to the subjects covered by these documents,
17 whether made prior to the date of my Work
18 Order or thereafter...”

19 Exh. 1, Subscriber Agreement (June 23, 2006
20 version) p. 2, ¶1.

21 28. The Subscriber Agreement and Work
22 Order controls the relationship between TWC
23 and its customers.

24 Exh. 1, Subscriber Agreement p. 2, ¶1;
25 Exh. 9, Su Depo., 57/17-20.

26 29. The entire agreement between TWC and
27 Dezes in connection with cable television
28 services and equipment is contained in the
Subscriber Agreement distributed to Dezes'
and Swinegar's franchise area in 2007, as well
as the Work Orders.

Exh. 1, Subscriber Agreement p. 2, ¶1;
Exh. 9, Su Depo., 57/17-20 (the subscriber
agreement and the work order control the
relationship between Time Warner and the
customer.)

30. Any oral statements made by TWC or its
representatives to Plaintiffs have been
superceded by the TWC Subscriber
Agreement.

Exh. 1, Subscriber Agreement p. 2, ¶1;
Exh. 9, Su Depo., 57/17-20.

1 31. Any oral statements made by Plaintiffs to
2 TWC or its representatives have been
3 superceded by the TWC Subscriber
4 Agreement.

5 Exh. 1, Subscriber Agreement p. 2, ¶1.

6 32. TWC's Standardized Subscriber
7 Agreement Utilized For Both Plaintiffs
8 Contains No Language Which Refers To Or
9 Otherwise Constitutes An Affirmative
10 Request

11 Exh. 1, Subscriber Agreement.

12 33. Section 22 of the TWC Subscriber
13 Agreement reads:

14 "Effect of Applicable Law; Reservation of
15 Rights. This Agreement, the Work Order and
16 the Terms of Use are subject to all applicable
17 federal, state or local laws and regulations in
18 effect in the relevant jurisdiction(s) in which I
19 receive my Services. If any provision of this
20 Agreement, the Work Order or the Terms of
21 Use contravene or are in conflict with any
22 such law or regulation, or if I am entitled to
23 more favorable rights under any such law or
24 regulation than are set forth in any provision
25 of this Agreement, the Work Order or the
26 Terms of Use, then the terms of such law or
27 regulation, or the rights to which I am entitled
28 under such law or regulation, shall take
priority over the relevant provision of this
Agreement, the Work Order or the Terms of
Use. If the relevant law or regulation applies
to some but not all of my Service(s), then
such law or regulation will take priority over
the relevant provision of this Agreement, the
Work Order or the Terms of Use only for
purposes of those Service(s) to which the law
or regulation applies. Except as explicitly
stated in this Agreement, nothing contained in
this Agreement shall constitute a waiver by
me or TWC of any rights under applicable
laws or regulations pertaining to the
installation, operation, maintenance or
removal of the Services, facilities or
equipment."

Exh. 1, Subscriber Agreement p. 11, ¶22.

34. Section 2(l) of the Subscriber Agreement does not operate as a waiver of plaintiffs' rights to restitution under the UCL and/or 47 U.S.C. 543(f).

Exh. 1, Sub. Agreement; ¶22.

35. TWC's Standardized Work Order Form Utilized For Both Plaintiffs Contains No Language Which Refers To Or Otherwise Constitutes An Affirmative Request

Exhs. 2, 3 & 4 (Work Orders for Plaintiffs)

2. Plaintiffs Paid Fees To TWC For Converter Boxes, Remote Control Devices And For Digital Programming Fees

36. TWC charged, and Plaintiff Mark Swinegar paid, \$136.46 for the rental of a **converter box** during the class period of April 2004 through April 2009.

Exh. 14, Time Warner Cable Inc.'s Responses to Plaintiff Mark Swinegar's Second Set of Special Interrogatories dated June 30, 2009, Response Nos. 57 & 58;
Exh. 5, Swinegar Billing Statements.

37. TWC charged, and Plaintiff Mark Swinegar paid, \$5.42 for the rental of **remote control** devices during the class period of April 2004 through April 2009.

Exh. 14, Time Warner Cable Inc.'s Responses to Plaintiff Mark Swinegar's Second Set of Special Interrogatories dated June 30, 2009, Response Nos. 59 & 60;
Exh. 5, Swinegar Billing Statements.

38. TWC charged and Plaintiff Michele Dezes paid \$244.81 for the rental of a **converter box** during the class period of April 2004 through April 2009.

Exh. 14, Time Warner Cable Inc.'s Responses to Plaintiff Mark Swinegar's Second Set of Special Interrogatories dated June 30, 2009, Response Nos. 61 & 62;
Exh. 6, Dezes Billing Statements.

1 39. TWC charged and Plaintiff Michele
2 Dezes paid \$10.69 for the rental of **remote**
3 **control** devices during the class period of
April 2004 through April 2009.

4 Exh. 14, Time Warner Cable Inc.'s Responses
5 to Plaintiff Mark Swinegar's Second Set of
6 Special Interrogatories dated June 30, 2009,
Response Nos. 63 & 64;
Exh. 5, Dezes Billing Statements.

7 40. TWC charged, and Plaintiff Michele
8 Dezes paid "**digital programing fees**" to
TWC during the class period.

9 Exh. 5, Dezes Billing Statements, listed
beginning 453 (06/05/07).

11 **3. Plaintiffs Did Not Affirmatively Request Equipment From TWC**

12 **A. Neither The Subscriber Agreement Nor Work Order Constitute An**
13 **Affirmative Request Under §543(f)**

14 41. According to TWC's Person Most
15 Knowledgeable, David Su, the Subscriber
16 Agreement does not constitute an "affirmative
request" for equipment since the customer
must specifically ask for it by name.

17 Exh. 9, Su Depo. 47/10-21 ("It [Subscriber
18 Agreement 2(b)] doesn't say it's an
19 affirmative request Because the way I
20 look at affirmative request, the customer
specifically asks for it by name So this
obviously, a writing, doesn't mean the
customer requests it by name specifically.").

21 42. There are no provisions of the Subscriber
22 Agreement which constitute an affirmative
request by a customer for equipment.

23 Exh. 1, Subscriber Agreement;
24 Exh. 9, Depo. Su, 45/14-22 (There is no
25 specific language in the Subscriber
26 Agreement which concerns a customer
making an affirmative request for a converter
box.).

1 43. Dezes Work Order reflects work to install
2 internet services only, not an order of digital
cable, converter boxes or remotes.

3 Exh. 4; Work Order for Dezes dated
4 September 29, 2007.

5 44. Swinegar's Work Orders do not use the
words "converter" or "remote" anywhere.
6 Exhs. 2 & 3; Work Orders for Swinegar dated
August 30, 2007 and August 31, 2007,
7 respectively.

8 45. There is no language in the Work Order
which constitutes an affirmative request by
9 Swinegar or Dezes.

10 Exhs. 2, 3 & 4; Swinegar & Dezes work
orders.

11
12 **B. Plaintiffs Never Orally Requested Equipment From TWC**

13 **(1) Plaintiffs' Undisputed Testimony And the Testimony of the CSR's**
14 **Who Handled Their Calls Demonstrate That Plaintiffs Never**
Requested Equipment From TWC

15 46. Adrina Smith, the CSR who handled
16 Mark Swinegar's telephone call on August
17 13, 2007, does not remember anything
specific about that conversation with Mr.
Swinegar.

18 Exh. 12, Smith Depo., p. 84/8-9.

19 47. Adrina Smith, does not remember if she
20 offered Swinegar the applicable promotion
for Surf N' View in August of 2007.

21 Exh. 12, Smith Depo., p. 87/5-7.

22 48. Pemberton does not remember his
telephone call with Plaintiff Dezes.

23 Exh. 11, Pemberton Depo., p. 82/20-24.

24 49. Smith was never trained to get a
25 customer to ask for equipment before
including it in their order.

26 Exh. 12, Smith Depo., p. 73/4-7.

1	50. During Dezes' September 2007 call with	
2	Pemberton she ordered internet only, not	
3	cable television service.	
4	<u>Exh. 11</u> , Pemberton Depo., 74/17-20; 77/12-	
5	24.	
6	51. Plaintiff Michele Dezes never requested a	
7	converter box or remote control from TWC.	
8	<u>Exh. 19</u> , Dezes' Resp.to Special	
9	Interrogatories, Nos. 1, 2, 4 &5; Dezes	
10	Declaration, ¶5 (Dezes did not request a	
11	converter box or remote control device from	
12	TWC); <u>Exh. 11</u> , Pemberton Depo. 132/5-	
13	133/6 (Dezes did not request a cable box or	
14	remote control).	
15	52. Plaintiff Mark Swinegar never requested	
16	a converter box or remote control from TWC	
17	<u>Exh. 20</u> , Swinegar's Resp.to Special	
18	Interrogatories, Nos. 1, 4 & 5;	
19	<u>Swinegar Declaration</u> , ¶3 (Swinegar did not	
20	request a converter box or remote control	
21	device from TWC and was not advised of the	
22	charges).	
23		

(2) The Common Pattern and Practice of TWC CSRs Was Not To Inform Customers of Applicable Equipment or Converter Box Charges; Or To Obtain Their Affirmative Request Therefor

18	53. Smith's regular practice with respect to	
19	communicating with customers of TWC is no	
20	different than any other CSR's regular	
21	practice.	
22	<u>Exh. 12</u> , Smith Depo., p. 84/22-25.	
23	54. Smith received the same training that	
24	every other CSR received at Time Warner.	
25	<u>Exh. 12</u> , Smith Depo., p. 70/11-15.	
26	55. Smith's regular and common practice	
27	with respect to communicating with	
28	customers of TWC is based on the training	
	she and all other CSR's received from TWC.	
	<u>Exh. 12</u> , Smith Depo., p. 85/15-23.	

1 56. Smith's regular and common practice
2 with respect to communicating with
3 customers of TWC is the same today as it was
4 in August 2007 when she spoke with Plaintiff
Mark Swinegar.

5 Exh. 12, Smith Depo., p. 84/11-14; 70/11-15.

6 57. Any call selected from Smith's sales calls
7 should follow her regular practice of
8 communicating with customers.

9 Exh. 12, Smith Depo., p. 141/22-142/2.

10 58. Call Recording No. 802994000285112r
11 ("Call No. 5112r")(between Adrina Smith,
12 the CSR who handled Plaintiff Mark
13 Swinegar's call, and a new TWC customer),
14 is evidence of any TWC CSR's common
15 practice with respect to communicating with
16 customers.

17 Exh. 12, Smith Depo., p. 141/22-142/2.

18 59. Call No. 5112r directly contradicts the
19 sworn testimony contained in Adrina Smith's
20 Declaration concerning her regular or
21 common practice in communicating with
22 customers.

23 Exh. 12, A. Smith Depo., p. 141/22-142/2;
24 145/15-25; 146/18-21; 147/5-8.

25 Exhibit 13, Transcript of Call No. 5112r

26 60. In Call No. 5112r, Smith did not tell the
27 customer of the applicable equipment charges
28 before she finalized the order.

Exh. 12, Smith Depo., p. 146/18-21;
Exhibit 13, Transcript of Call No. 5112r.

61. In Call No. 5112r, Smith failed to advise
the customer that a remote control came with
each converter box.

Exh. 12, Smith Depo., p. 145/15-25;
Exh. 13, Transcript of No. 5112r.

62. In Call No. 5112r, Smith never received a
verbal agreement from the customer that the
equipment included in the order was accurate.

Exh. 12, Smith Depo., p. 147/5-8;
Exhibit 13, Transcript of Call No. 5112r.

63. Smith was never trained that customers must ask for equipment by name before being billed for it.

Exh. 12, Smith Depo., p. 138/22-139/2.

64. Michael Pemberton, the CSR who handled Dezes' call, has never been trained to get the customer to request equipment before he finalizes their order.

Exh. 11, Pemberton Depo., 68/20-69/8.

65. CSR's are not required to have a customer ask for equipment before the CSR can include that equipment in the customer's order.

Exh. 12, Smith Depo., p. 81/12-16.

66. Adrina Smith did not advise the customer on Call No. 5112r of any applicable equipment charges.

Exh. 12, Smith Depo. P. 146/18-21.

67. The customer on Call No. 5112r was never told of applicable equipment charges before Smith finalized the order.

Exh. 12, Smith Depo. p. 146/18-21.

(3) Remote Control Devices Were Not Affirmatively Requested

68. Time Warner CSR's are not trained or supposed to inform customers that they will pay extra for a remote control device or that remote controls have a monthly cost.

Exh. 12, Smith Depo., p. 88/11-14;
Exh. 11, Pemberton Depo. 116/20-24.

69. In her 12 years as a CSR for TWC, Smith has never told a customer that they can rent a receiver without a remote control device.

Exh. 12, Smith Depo., p. 118/19-119/9.

1	70. In 2007 it was TWC's policy and practice	
2	to send out a remote with every converter	
3	box, a policy and practice which exists today.	
4	<u>Exh. 12</u> , Smith Depo., p. 113/12-16; 113/20-	
5	22.	
6	<u>Exh. 17</u> , Order Accuracy Rules ("Box	
7	Remote Quantity - Rule brief description:	
8	Total number of boxes must match total	
9	number of remotes."	
10	71. In 2007, TWC's computerized ordering	
11	system, ACSR, did not contain a separate	
12	check box for "Remote Control," and there is	
13	no check box for "Remote Control" today.	
14	<u>Exh. 12</u> , Smith Depo., 113/9-11; 113/17-19;	
15	<u>Exh.23</u> , TWC_SWIN 557.	
16	72. Smith does not advise customers that the	
17	price for service includes anything other than	
18	taxes and cable box charges.	
19	<u>Exh. 12</u> , A. Smith Depo., p. 87/15-22.	
20	73. The remote control is not listed on the	
21	TWC billing system.	
22	<u>Exh. 12</u> , Smith Depo., p. 133/13-15	
23	74. In Call No. 5112r, Smith never uses the	
24	words "remote" or "remote control" or tells	
25	the customer that a remote control unit came	
26	with the converter box.	
27	<u>Exh. 12</u> , Smith Depo. p. 145/19-25.	
28		

(4) The Digital Programming Fees Were Not Affirmatively Requested

22	75. CSR's are not trained by TWC to discuss	
23	the digital programming fee with customers.	
24	<u>Exh. 12</u> , Smith Depo., p. 127/6-8.	
25	76. When a customer orders and additional	
26	converter box, the TWC billing system	
27	automatically charges the customer and	
28	additional \$2 digital programming fee.	
	<u>Exh. 12</u> , Smith Depo., p. 128/10-13.	

1 77. Before they complete a customer's order
2 that includes a \$2 digital programming fee,
3 CRS's do not get the customers request.

4 Exh. 12, Smith Depo., p. 129/12-130/2.

5 78. The digital programming fee is a \$2
6 charge applied to each additional cable box.

7 Exh. 11, Pemberton Depo. p. 100/6-8.

8 79. TWC does not advise its CSR's of
9 anything about the digital programming fee
10 except to add the charge to each additional
11 converter box.

12 Exh. 11, Pemberton Depo. p. 100/9-18

13 **C. Additional Triable Issues of Material Fact Precluding Summary Judgment**
14 **By Defendant**

15 80. The TWC billing system does not show
16 anything that a customer says verbally.

17 Exh. 9, Su Depo., p177/12-74/8.

18 81. A customer who telephones TWC and
19 requests a change from a Bronze Package to
20 Surf N' View, such as Dezes, does not
21 affirmatively request a converter box or
22 remote control device.

23 Exh. 9, Su Depo., p178/1-9.

24 82. The preprinted language of the work
25 order states:

26 "My signature on this work order indicates
27 that I have received and agreed to the terms of
28 the Time Warner Subscriber Residential
Services Agreement separately provided me
by Time Warner Cable The terms of the .
. . . Subscriber Agreement . . . are incorporated
into this work order by reference as if set
forth in full herein."

Exhs. 2, 3 & 4.

1 83. The language of the work order does not
2 state or refer to Plaintiffs Swinegar or Dezes
3 affirmatively requesting a converter box or
4 remote control device by name from TWC.

5 Exhs. 2, 3 & 4.

6 84. As admitted by TWC's PMK, David Su,
7 none of the preprinted language on the Work
8 Order constitutes an affirmative request by
9 name for either a converter box or remote
10 control unit.

11 Exh. 9, Depo. David Su, p. 183/4-8.

12 85. As admitted by TWC's PMK, David Su,
13 any language added by the technician to the
14 work order form, such as serial numbers for
15 converter boxes, constitutes an affirmative
16 request.

17 Exh. 9, Depo. David Su, p. 200/12-201/21.

18 86. Asking for a level of cable service that
19 requires a converter box is not the equivalent
20 of asking for the equipment.

21 Exh. 9, Depo. David Su, p. 178/21-179/8.

1 87. TWC CSRs are not trained to inform
2 subscribers of charges for converter boxes,
3 remote control devices or digital
programming fees.

4 Exh. 12, Smith Depo., 84/22-25 (Smith's
5 regular practice in communicating with
6 customers of TWC is no different than any
7 other CSR's regular practice); 141/22-142/2
8 (Any call selected from Smith's sales calls
9 should follow her regular practice of
communicating with customers); 146/18-21
10 (Smith did not advise the customer on Call
11 No. 5112r of any applicable equipment
12 charges); 147/5-8 (Customer on Call No.
13 5112r never agreed that the equipment
14 included in the order was accurate).

15 Exh. 13, Transcription of Call No. 5112r.

16 Exh. 11, Mike Pemberton ("Pemberton")
17 Depo. 116/20-24 (It is not part of CSR's
18 training at TWC to advise customers that
19 remote controls have a monthly cost).

20 Dezes Declaration (filed concurrently
21 herewith); ¶ No. 4 (not advised of separate
charges for converter or remote - or discovery
responses).

22 Exh. 19.; Dezes' Responses to Special
23 Interrogatories of TWC (Nos. 1,2,4,5,8 & 13
24 (she did not request and was not advised of
25 additional equipment charges for cable); No.
26 11 (she believed the charges for converters
27 and remotes were included within monthly
28 price for cable).

Swinegar Declaration (filed concurrently
herewith: ¶ No. 3 (Swinegar did not request a
converter box or remote control device by
name from TWC and was not advised of the
charges for the converter or remote

Exh. 20. Plaintiff Swinegar's Responses to
Special Interrogatories, Nos. 1,4 & 5.

88. TWC's PMK, Sagi Shimonovitz, testified
that Swinegar's call in September 2007 was
recorded by TWC, and should have been
available to review for up to 8 months after it
was recorded, or through the end of May
2008, one month after the present suit was
filed and two months after TWC had notice of
Swinegar's claims against it.

Exh. 24, Shimonovitz Depo, Vol. 2, at 207/9-
12; 209/13-20;
Exh. 22, CLRA Letter.